

BEST PRACTICES FOR WATER QUALITY TRADING

JOINT REGIONAL AGREEMENT

Discussion Guide (Appendix), August 8th, 2013

This Discussion Guide Appendix is intended to provide definitions, context, analysis, and options for addressing various components of water quality trading programs. It poses questions that will be discussed at the interagency workshops. This document may reference other trading programs, examples, or documents, but is not intended to serve as a published report or white paper and thus will not be extensively cited. This document will be included in the workshop packet and posted online following each workshop.

Role of State Agencies, NPDES Permittees, and Third Parties (Section 4.1,7,8)

Appendix 2: Confidentiality, Privacy, and Information Disclosure Reqs

Water quality trading brings private landowners, federal and state agencies, and businesses to the table to improve watershed health. Each of these entities will have been traditionally subject to different regulations and laws. As they conduct business together in these new markets, federal and state agencies will need to consider the types of information that will be shared among these parties and how public access to trading-related documents will be facilitated.

If, for example, a landowner is generating nutrient credits, how much information should be made available on A) the location of the property, B) the quantity of fertilizer used, or C) how much crop the parcel produced? If a third party is verifying BMPs directly or indirectly on behalf of a state agency, is all the information the agency reviews in the process of verification subject to public disclosure? These questions are becoming increasingly important to answer as more external organizations around the country are requesting information related to trading.

The specific pieces of information most relevant to privacy and disclosure concerns include:

- Landowner/farm practices (e.g., fertilizer application rates);
- BMP locations and personally identifiable information about landowners; and
- Project developer practices (e.g., contracts and BMP maintenance costs).

This section describes existing state and federal regulations governing disclosure of information, the general reporting and disclosure requirements of the NPDES permit, and how trading programs have applied these practices to date. Agencies may use and evaluate these provisions and practices to decide which categories of information provided to third party verifiers or agencies must be disclosed and which may be exempted from public disclosure, if necessary due to privacy or proprietary concerns.

5.10.1 Existing Federal and State Regulations

Federal

Under the federal Freedom of Information Act (FOIA)¹ and Clean Water Act (CWA),² the general public has a right to obtain access to copies of federal agency records, except where such records fall into exemption or exclusion categories.

As a threshold matter, it is relevant to discern whether records maintained by independent, non-delegated third parties in trading programs qualify as public records. “Record” and “information”, as those terms are used in FOIA statute, mean “(A) any information that would be an agency record subject to the requirements of this section when maintained by an agency in any format, including an electronic format [and] (B) any information described under subparagraph (A) that is maintained for an agency by an entity under Government contract, for the purposes of records management.” For trading-related records maintained by such private parties, it is unclear whether such records may be obtained by the public without a contractual relationship between such parties and a federal agency.

Assuming the document is a public record, the category of exemption most germane to trading programs is Exemption 4 (Confidential Commercial Information),³ with further guidance set forth in EPA’s regulations at 40 C.F.R. § 2.201 *et. Seq* that defines the types of confidential information and how to identify it as confidential.⁴ In the event that records are asked for in a FOIA request that may potentially contain confidential business information, EPA provides notice to the affected business(es)⁵ and an opportunity to substantiate any claim of confidentiality.⁶ EPA legal counsel will subsequently evaluate such claims on the basis of the corroborating materials and make a determination on the information’s confidentiality.⁷ If information was claimed and marked confidential at the time it was provided, EPA will regard such information as confidential unless disclosure is otherwise required by a federal court.⁸

Idaho

In Idaho, public records requests are governed by the corresponding Idaho Public Records Law, located at Idaho Code § 9-337 *et seq*. Similar to the federal FOIA, Idaho laws do not clearly note whether records maintained by independent, non-delegated third parties in trading programs qualify as public records.⁹ In

¹ 5 U.S.C. § 552.

² 40 C.F.R. § 122.7; 40 C.F.R. § 123.25(3).

³ 5 U.S.C. 552(b)(4).

⁴ 40 C.F.R. § 2.208 more specifically outlines the substantive criteria to be used in determining matters of confidentiality: a business must assert a claim, take reasonable measures to protect confidentiality, and the information must be generally unavailable elsewhere. In addition, disclosure of the information must not be compulsory elsewhere under statute, and the business must also show that disclosure of the voluntarily-provided information would hinder an agency’s ability to obtain information in the future, or that disclosure of such information would cause substantial competitive harm.

⁵ 40 C.F.R. § 2.208(e)(1).

⁶ 40 C.F.R. § 2.208(e)(4)(i-ix).

⁷ 40 C.F.R. § 2.205.

⁸ 40 C.F.R. § 2.205(c).

⁹ “Public record” in Idaho is defined as encompassing “any writing containing information relating to the conduct or administration of the public’s business prepared, owned, used or retained by any state agency, independent public body corporate and politic or local agency regardless of physical form or characteristics.” I.C. § 9-337(13). “Independent public body corporate” is the Idaho housing and finance association. Independent third party organizations do not appear to qualify as one of these agencies, absent an appointment of authority. However, state agencies may not assign maintenance of records to independent third parties as a means of circumventing review of public records. *Idaho Conservation League, Inc. v. Idaho State Dep’t of Agric.*, 143 Idaho 366 at 369 (2006).

addition to other records exempt from disclosure,¹⁰ trade secrets and certain types of personal information may be withheld if the information meets statutory criteria. Personal information contained in records, “other than names, business addresses and business phone numbers ... submitted to any public agency ... pursuant to a statutory requirement for licensing, certification, permit or bonding”,¹¹ may be exempted. Information required by and/or submitted pursuant to a trading program or permit, including project developer names and business information, therefore must likely be divulged. However, unless extraneous information such as private landowner names, addresses, and other personally identifiable details of project sites are expressly required by agencies for trading or permit compliance, such non-business-related information may be withheld from disclosure.

Trade secrets may similarly be exempted if they fall into one or more following categories: a formula, pattern, compilation, program, computer program, device, method, technique, process, or unpublished or in progress research.¹² Secrets must meet a two-pronged standard, showing value and restriction on dissemination, to satisfy disclosure exemptions.¹³ Similar to federal EPA rules, under Idaho Department of Environmental Quality (Idaho DEQ) regulations in the Idaho Administrative Code, a person providing a document that contains trade secrets may also preemptively indicate on the record that all or a portion of the information is confidential, along with supporting information.¹⁴ If a request for a record containing trade secrets is made, the director of the Idaho DEQ will make a determination as to its confidentiality within the requisite period of time and respond accordingly.¹⁵

Oregon and Washington

Similar to the federal FOIA and Idaho state law, Oregon and Washington laws do not clearly note whether records maintained by independent, non-delegated third parties in trading programs qualify as public records.¹⁶ Oregon and Washington maintain comparable processes for disclosure of public records under their respective statutory provisions,¹⁷ though the statutes slightly diverge in defining the categories of eligible trade secret information. In Oregon, all records held by the Department of Environmental Quality (Oregon DEQ) are public unless such records fall into exemption categories.¹⁸ Information may be considered an exemptible trade secret if it is “any formula, plan, pattern, process, tool, mechanism, compound, procedure, production data, or compilation of information which is not patented[,]” is limited general knowledge with actual or potential value, and gives its user “an opportunity to obtain a business advantage over competitors who do

¹⁰ See I.C. § 9-340A-H.

¹¹ I.C. § 9-340C(8).

¹² I.C. § 9-340(D)(1); *see also* IDAPA 58.01.02.006 for codification of the trade secrets exemption under Idaho Department of Environmental Quality Water Quality Standards regulations.

¹³ Those claiming a trade secret that falls under one of the enumerated categories must generally show (a) that the secret has independent value (actual or potential) that would otherwise be compromised if known and readily ascertainable to others, and (b) reasonable efforts were made to maintain the secret’s confidentiality. I.C. § 9-340(D)(1)(a-b).

¹⁴ IDAPA 58.01.21.012(01). The types of supporting information to be provided are similar to federal EPA rules and are found at IDAPA 58.01.21.014(3). Criteria for determination reflect responses to supporting points, and are found at IDAPA 58.01.21.015(02).

¹⁵ I.C. § 9-342A(6)(1). In limited situations (e.g., where required by law or judicial proceedings), disclosure of trade secrets may be compelled. *See* IDAPA 58.01.21.16.

¹⁶ Definitions of “public records” are analogous to Idaho’s and are mirrored in Oregon and Washington at ORS § 192.410 and RCWA 42.56.010(3), respectively. Oregon makes a specific exception for written documents that are unrelated to “the conduct of the public’s business” that are kept on private computers. ORS § 192.410(4)(b).

¹⁷ Private personal information is similarly protectable in Oregon under ORS § 192.502(2) and in Washington under RCWA 42.56.210.

¹⁸ OAR 340-011-0390.

not know or use it.”¹⁹ If disclosure of records, reports, and other information would reveal trade secrets consisting of “a secret process, device, or method of manufacturing or production entitle to protection as trade secrets”, the director of Oregon DEQ is instructed to withhold such information.²⁰ In Washington, a trade secret is a “formula, pattern, compilation, program, device, method, technique, or process” that provides a person with economic value (again, actual or potential) and reasonable efforts were made to maintain the secret’s confidentiality.²¹ The Washington Department of Ecology (Washington DOE) must similarly keep confidential the methods or processes that qualify as trade secrets that have been submitted in documents or records related to its NPDES permitting program.²²

5.10.2 Current Record-keeping and Reporting under Trading Programs

To date, public accessibility of records related to trading are less well-defined than states’ existing public records guidelines. Oregon’s 2009 Water Quality Trading IMD states that “information on individual trades, trading programs, trading results, and compliance and inspections reports for specific permittees are available for the public review from DEQ upon request”,²³ while the NPDES permit held by the City of Medford states that “DEQ approval and public review is not required for trading agreements, specific project sites, or minor amendments to the program provided they are consistent with the overall direction and objectives of the permittee’s DEQ-approved credit trading program.”²⁴ As a component of the permit, Medford must make certain information available to DEQ within fourteen days of request. This information includes project names and addresses, general project descriptions, and site monitoring and planting information; however, if the information is kept on private computers up until such information is provided to DEQ, it is not apparent whether such information is accessible by or required to be disclosed to the public.

In Idaho, Washington, and other states where existing trading programs are in similar, early stages, agencies have recognized the importance of transparency and public access but are likewise in the process of developing and refining such frameworks and balancing confidentiality concerns. Idaho DEQ has developed a trade notification form and reduction credit certificate that must be submitted to Idaho DEQ as part of the process. Such information is kept on file at Idaho DEQ offices and would be subject to public inspection.²⁵ Washington DOE’s draft trading framework also notes disclosure as an important element of a credible water quality trading program.²⁶ Finally, though NPDES permits issued under the Ohio and Chesapeake TMDL program are less readily accessible, the Ohio River Basin trading plan reflects the delicate balance between disclosure and individual confidentiality concerns; initial informational meetings facilitated by EPRI brought out similar concerns,²⁷ with the final agreement reflecting that non-confidential information on trades and

¹⁹ ORS § 192.501(2).

²⁰ ORS § 468.095(2).

²¹ RCWA 19.108.010; RCWA 42.56.270(11).

²² WAC 173-220-080.

²³ Oregon DEQ Water Quality Trading Internal Management Directive (December 2009) at 8, available at http://www.ecy.wa.gov/programs/wq/swqs/WQTradingGuidance_1010064.pdf.

²⁴ NPDES Waste Discharge Permit for City of Medford (December 13, 2011) at 21, available at <http://www.deq.state.or.us/wq/trading/docs/MedfordNpdesPermit.pdf>.

²⁵ Idaho DEQ Water Quality Pollutant Trading Guidance (July 2010) at 18, available at http://www.deq.idaho.gov/media/488798-water_quality_pollutant_trading_guidance_0710.pdf.

²⁶ Washington DOE Draft Trading Framework Paper for Review and Comment (September 20, 2010) at 4, available at http://www.ecy.wa.gov/programs/wq/swqs/WQTradingGuidance_1010064.pdf.

²⁷ Ohio River Basin Trading Project Soil and Water Conservation District (SWCD) Informational Meeting (July 6, 2010) at 5-5, available at <http://www.farmland.org/documents/OhioRiverBasinTradingProjectSWCDMeeting.pdf>

verification will be made public for review and inspection.²⁸ These types of finely balanced outcomes are likely to be impacted by the delegation question as well.

5.10.3. Conclusions and Considerations

Each agency may wish to have their attorneys review and provide advice on which types of trading-related information should be held confidential and which should be subject to disclosure. These concerns are particularly relevant for private landowners who are participating in trading and for private businesses that may make proprietary information available to agencies and third parties in the process of verification. Agencies should also consider the differences between what types of information a trading program makes “actively” available (e.g., by posting it on a website or in reports), and which information is generally not available on the internet but may be made available via a public records request.

In programs where private third party verifiers or market administrators are accruing compliance and private landowner information, privacy will be a necessary concern. Yet, if there is formal delegation of federal/state authority to this third party, then public disclosure rules may still apply.

Recommended default: In general, every trading program should maintain a policy on confidential business information that is consistent with applicable state and federal rules.

²⁸ Pilot Trading Plan 1.0 for the Ohio River Basin Interstate Water Quality Trading Project (“Verification records will be maintained and the non-confidential portions of those records may be made available to the public upon request.”), available at http://wqt.epri.com/pdf/signed_orb_trading_plan_20120822_final.pdf.